

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 21, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2683

Cir. Ct. No. 2012CV527

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN EX REL. MITCHELL G. ZIMMERMAN,

PETITIONER-RESPONDENT,

V.

DAVID H. SCHWARZ,

RESPONDENT-APPELLANT,

MATTHEW J. FRANK,

RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: J.
MAC DAVIS, Judge. *Reversed.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 PER CURIAM. The circuit court granted Mitchell G. Zimmerman’s petition for certiorari and reversed and remanded this matter for a new hearing on Zimmerman’s probation revocation. Division of Hearings and Appeals (the Division) administrator David H. Schwarz appeals the circuit court order. We agree with Schwarz that our standard of review dictates reversal because Zimmerman has not established that the determination was arbitrary and capricious. We reverse the circuit court order.

¶2 In 2004, seventeen-year-old Zimmerman pled guilty to repeated first-degree sexual assault of a child after multiple instances of forcing his eleven-year-old cousin to engage in oral, vaginal and anal intercourse. The circuit court sentenced him to twenty-five years’ imprisonment and fifteen years’ extended supervision, imposed and stayed upon successful completion of ten years’ probation. The court also ordered a year in jail as condition of probation.

¶3 Zimmerman began violating the rules of probation while on work release. The Department of Corrections (DOC) initiated revocation proceedings but eventually dropped them. Over the next several years, Zimmerman racked up dozens more violations, leading to repeated warnings and brief periods of punitive custody. In 2008, the DOC pursued revocation against him after an episode in which, without the permission of his agent, he went to a shopping mall with a friend. Zimmerman initially denied being in the mall but finally admitted he was there and that he knew the friend was shoplifting.

¶4 After an evidentiary hearing in April 2008, the Administrative Law Judge (ALJ) granted Zimmerman “one last chance to improve his behavior.” The ALJ reinstated Zimmerman’s probation but cautioned him that a failure to strictly adhere to the law and his rules of supervision would warrant revocation.

¶5 Zimmerman continued to accrue warnings for rule violations. In early 2011, Zimmerman admitted consuming alcohol, viewing pornography, and being untruthful to his agent. He accepted an alternative to revocation (ATR) that required electronic monitoring, alcohol monitoring, and participation in and successful completion of AODA treatment and a sexual offender treatment (SOT) Life Skills program, a more cognitive-based spin-off of standard SOT.

¶6 Zimmerman never made it off the waiting lists for either of two AODA treatment programs and the DOC enrolled him in standard SOT rather than Life Skills. About five months later, Zimmerman revealed to his agent that he had been regularly purchasing beer for his neighbor as payment for caring for his dog, that in late 2010 he had gotten drunk and took one “hit” from a friend’s marijuana pipe, and that a family with several children moved into the apartment next door and he sometimes was outside at the same time that the children were. Despite having been asked about rule violations on numerous occasions, Zimmerman had not given his agent this information. As a result of these admissions, Zimmerman was terminated from the SOT program.

¶7 The DOC initiated revocation proceedings on the basis that Zimmerman failed to complete SOT and violated the rules of his ATR. After an evidentiary hearing, the ALJ revoked his probation. Zimmerman appealed to the Division, asserting that his continued violations stemmed from the DOC’s failure to enroll him in AODA or Life Skills programming. The Division affirmed the ALJ’s decision. It acknowledged that the Life Skills program may have been beneficial but found that many of Zimmerman’s violations related to issues for which he already had had “ample treatment.” The Division concluded that, as the DOC had made reasonable efforts to rehabilitate him within the community and had exhausted its options, the overriding interest now was to protect the public.

¶8 Zimmerman petitioned the circuit court for certiorari review. The court granted the petition, found that the Division’s decision to sustain revocation was arbitrary and made without substantial evidence, and ordered the case remanded for a new revocation hearing. The Division appeals.

¶9 When reviewing probation revocation decisions, this court must defer to the administrative tribunal’s determinations. *Von Arx v. Schwarz*, 185 Wis. 2d 645, 655, 517 N.W.2d 540 (Ct. App. 1994). Our scope of review is limited to the following questions: (1) whether the agency kept within its jurisdiction; (2) whether the agency acted according to law; (3) whether the agency's actions were arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that the agency might reasonably make the order or determination in question. *Van Ermen v. DHSS*, 84 Wis. 2d 57, 63, 267 N.W.2d 17 (1978).

¶10 “A certiorari court may not substitute its view of the evidence for that of the [agency].” *Id.* at 64. The only inquiry is whether substantial evidence supports the Division’s decision. *Von Arx*, 185 Wis. 2d at 656. “Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion.” *Id.* If substantial evidence supports the Division’s decision, it must be affirmed even if the evidence also supports a contrary determination. *Id.*

¶11 The Division argues that its decision should stand because Zimmerman did not adequately demonstrate arbitrariness or unreasonableness. Zimmerman, by contrast, contends that the decision to revoke his probation represented the DOC’s will, rather than its reasoned judgment, because it did not consider viable, available alternatives to revocation and that he was doomed to fail

in the community due to the DOC's "willful[] fail[ure]" to provide AODA or Life Skills programming.¹ We agree with the Division.

¶12 The probationer must prove by a preponderance of the evidence that the revocation decision was arbitrary and capricious. *State ex rel. Solie v. Schmidt*, 73 Wis. 2d 76, 79-80, 242 N.W.2d 244 (1976). The Division's decision is not arbitrary or capricious if it constitutes a proper exercise of discretion. *Van Ermen*, 84 Wis. 2d at 64-65. Thus, the decision must reflect a reasoning process based on the facts on the record and a "conclusion based on a logical rationale founded upon proper legal standards." *Von Arx*, 185 Wis. 2d at 656.

¶13 Reviewing the record here, we cannot conclude that the administrator's decision was arbitrary and capricious. He found that Zimmerman admitted to fourteen rule violations, including computer usage without agent approval, viewing pornography, consuming alcohol and marijuana, having contact with minors, failing to provide truthful and accurate information about those actions to his agent, and failing his ATR by being unsuccessfully discharged from SOT. The ATR required that he abide by the rules of the programs he was placed in (here, standard SOT) and warned him that any rules violation could result in a recommendation for revocation. Finally, although some of the fourteen violations predated the ATR, at minimum the repeated beer purchases for his neighbor were recent, as were the tardy disclosures of older violations. A violation of any condition of supervision constitutes sufficient grounds for probation revocation. *See State ex rel. Cutler v. Schmidt*, 73 Wis. 2d 620, 622, 244 N.W.2d 230 (1976).

¹ Zimmerman was enrolled in Alcoholics Anonymous while awaiting AODA placement but the record is silent as to why the DOC did not place him in Life Skills SOT programming.

¶14 The circuit court concluded that the DOC and the Division failed to take into account evidence of Zimmerman's successes. A reviewing court on certiorari does not weigh the evidence presented to the tribunal, however. *Van Ermen*, 84 Wis. 2d at 64. Rather, the inquiry is limited to whether any reasonable view of the evidence supports the tribunal's decision. *See State ex rel. Jones v. Franklin*, 151 Wis. 2d 419, 425, 444 N.W.2d 738 (Ct. App. 1989).

¶15 The administrator noted that the DOC had repeatedly attempted to address Zimmerman's many violations with alternatives to revocation, including warnings, jail time, and treatment referrals, yet the violations continued. He concluded that the DOC made a substantial effort to rehabilitate Zimmerman in the community, that its efforts were reasonably exhausted, and that the overriding issue of community safety made revocation the only proper choice. The ultimate question in a revocation proceeding is whether the interests of community safety and of the probationer's rehabilitation are better served by continued liberty or incarceration. *State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502, 513, 563 N.W.2d 883 (1997). The DOC concluded, and the Division administrator agreed, that revocation was necessary to protect the public, and that the seriousness of the violations would be unduly depreciated if revocation was not ordered. These findings of ultimate fact are supported by substantial evidence and thus could not be questioned by the circuit court in its certiorari review. *See Van Ermen*, 84 Wis. 2d at 66. We need not agree with the revocation as long as a reasonable view of the evidence supports the decision. Here, it does.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2011-12).

